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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-184

RICHARD J. PORTELA,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 6, 1971

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The Petitioner, RICHARD J. PORTELA, prays that a Writ of Certiorari issue to review the judgment and opinion entered on July 7, 1971, by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, Appellee, v. Samuel F. Manarite, Richard J. Portela, et al., Defendants-Appellants.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on July 7, 1971. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. In a prosecution under Title 18, United States Code, Section 1465, was it reversible error for the Trial Court to exclude all offers of evidence relating to the issue of contemporary community standards?

2. In a prosecution under Title 18, United States Code, Section 1465, was it proper for the Trial Court to instruct that children were to be considered in determining what were the established contemporary community standards?

3. Whether the instan warrantless search and seizure exceeded the permissible scope of such search as set forth in Chimel v. State of California?

Statutory Provisions

Title 18, United States Code, Section 1465, provides in part as follows:

> "Whoever knowingly transprts in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Statement of the Case

THE CONTEMPORARY COMMUNITY STANDARDS ISSUE:

The Petitioner, Richard J. Portela, along with fourteen other named defendants, was indicted in a thirteen count

Indictment charging twelve acts of violating Title 18, United States Code, Section 1465, i.e.: transporting or causing to be transported in interstate commerce obscene materials, and conspiracy. The facts which underlie the questions herein presented relate to that portion of the Trial Court's charge which spoke to the issue of contemporary community standards. The Trial Court instructed the jury that in order to find the defendants guilty of violating Section 1465, the Government must prove, beyond a reasonable doubt, several elements, the first being that the material was obscene. (A 730)[1] With regard to the issue of obscenity, the Court charged that the materials must be found to have a dominant theme which when taken as a whole appeals to a prurient interest. Secondly, the jury was to find that the material was patently offensive to the average person applying contemporary community standards. The third requirement was that the matter be found to be utterly without redeeming social value. (A 737)

In attacking the Government's case, the Petitioner, by his counsel, made diverse attempts to offer into evidence exhibits and testimony which would shed light upon the issue of contemporary community standards, thereby giving the jury more knowledge than just their own experience in determining this vital question. The record reveals that the Petitioner, through the testimony of a witness who related that he had purchased items in Los Angeles, California, similar to those introduced by the Government, sought to admit into evidence two books, a deck of cards and a film to give the jury an opportunity to compare the items in

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[1] The letter "A" is used to introduce references to the Appellant's Appendix on file in the United States Court of Appeals for the Second Circuit.

evidence to the items which may freely be purchased in a book store in another part of the United States. (A 601) The Trial Court was unreceptive to this offer of proof. (A 607) Further attempts to enlighten the jury on the question of contemporary community standards included Petitioner's offer to introduce various films which he represented to be identical to the films offered by the Government. Moreover, Petitioner's counsel, in still another offer of proof, stated that if given the opportunity, materials could be introduced that were purchased in Baltimore, Maryland, Philadelphia, Pennsylvania, San Francisco and San Diego, California, Chicago, Illinois, Cleveland, Dayton and Cincinnati, Ohio, Buffalo, Albany and Syracuse, New York, Providence, Rhode Island, Boston, Massachusetts, Indianapolis, Indiana, St. Louis and Kansas City, Missouri, Memphis, Tennessee, Miami, Florida, Charleston, West Virginia, Minneapolis, Minnesota. (A 622) This offer of proof was also rejected. (A 631)

Additional attempts to illuminate contemporary standards were offered in the form of newspapers from cities throughout the country which advertised in their entertainment section films being displayed in public theaters which counsel contended were similar to the Government's evidence. (A 655) In still another abortive effort, counsel sought to introduce the Report of the Presidential Commission on Obscenity and Pornography. (A 640)

Further issue regarding the Trial Court's treatment of the contemporary community standards was raised with respect to the Trial Court's instructions to the jury on this point. In its charge to the jury, the Trial Court instructed:

> "In determining the common conscience of the community, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children..." (A 735).

The Petitioner's counsel timely excepted to that portion of the charge which instructed the jury to consider children in determining contemporary community standards.

The Circuit Court of Appeals affirmed the Trial Court's rejection of the Petitioner's offer of proof with regard to the issue of contemporary community standards and approved the Court's charge on this issue. (Slip Op. 4051 and 4052).

THE ILLEGAL SEARCH AND SEIZURE ISSUE:

Prior to the trial of the action herein, an evidentiary hearing was held on the Petitioner's Motion to suppress evidence which was seized at the Petitioner's apartment on the morning of his arrest.

The facts elicited at that hearing indicated that in the early morning hours of July 23rd, 1969, four Special Agents of the Federal Bureau of Investigation, a nurse employed by the Bureau and two officers from the New York City Police Department, entered the Petitioner's apartment, armed with arrest warrants for the Petitioner, Richard J. Portela and defendant Carol Portela.[2] (A 142-143) The entry was made without a search warrant. It was the uncontradicted testimony of Special Agent John Monaghan that the Petitioner, Richard J. Portela, unlocked the door and was taken into custody while standing in his living

[2] The Petitioner's wife, Carol Portela, was acquited by the jury on both the conspiracy and substantive counts charged.

room next to a portable bar. (A 143) The two Special Agents who accompanied Agent Monaghan through the doorway were Agents William Roemer and Ambrose Conroy. Federal Agent Barry Goas entered the apartment from an outside terrace with the two members of the New York City Police Department and the Bureau nurse. (A 279) Agents Conroy and Roemer took custody of the Petitioner and kept him in the area where he was first detained. (A 144)

Agent Monaghan then testified that he saw two individuals laying in a prone position on the couch at the left end of the living room. (A 146) It was subsequently determined that these two unidentified individuals had no relevency to the instant proceedings and were not wanted by either the Federal or State authorities.

At the time the Petitioner, Richard J. Portela, was placed in custody, his wife, the defendant, Carol Portela, came out of one of two bedrooms in the apartment and inquired as to what was transpiring. (A 147) Agent Monaghan at that time identified himself to her, told her of the warrant, and placed her under arrest. Subsequent to placing these two individuals under arrest the Federal agents conducted a series of searches which the Petitioner contends were without the scope of a search incidental to a lawful arrest. The Trial Court upheld each of these searches and subsequent seizures as being conducted lawfully within an area from which either defendant "might gain possession of a weapon or destructbile evidence". (A 315)

The Court of Appeals affirmed the District Court's decision and held that the search and seizure were entirely within the scope of CHIMEL. (Slip Op. 4054)

REASONS FOR GRANTING THE WRIT

POINT I

The decision of the Court of Appeals on the issue of contemporary community standards is in conflict with decisions of the United States Supreme Court.

The Court of Appeals has decided that the Trial Court's failure to allow into evidence proffered exhibits and testimony which would shed light on the issue of contemporary community standards was not reversible error. The Appellate Court stated that:

> "Such proof would normally be supplied by expert witnesses. No such proof was offered". (Slip Op. 4052)

Furthermore, the Court of Appeals held that the Trial Court's charge regarding contemporary community standards did not "put any undue emphasis on the fact that the children are part of this community". (Slip Op. 4051)

Petitioner, Richard J. Portela, respectfully submits that these findings are in error in view of this Court's decisions in *Roth* v. *United States, 354 U.S. 476 (1957)* and *Butler* v. *State of Michigan, 352 U.S. 380 (1957).*

In *Roth* v. *United States, (supra),* this Court set forth the guidelines for determining what matter may be defined as obscene. Nine years later, in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413 (1966),* this Court amplified the *Roth* decision in ruling that in order to find material obscene, three elements must coalesce. These elements are:

(1) The dominant theme of the material taken as a whole appeals to a prurient interest in sex.

(2) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.

(3) The material is utterly without redeeming social value.

The logical inference to be drawn from the *Roth-Memoirs* test is that matter which is found not to affront contemporary community standards would, as a matter of law, not be obscene even though (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex, and (b) the material is utterly without redeeming social value. Therefore, in making a determination of obscenity, one vital question which the jury was to consider, was whether the material introduced into evidence affronted contemporary community standards.

Mr. Justice Frankfurter, in *Smith* v. *People of the State of California, 361 U.S. 147 (1959)*, stated:

> "There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, Roth v. United States, 354 U.S. 476, 489, 77S. Ct. 1304, 1311, 1 L. Ed. 2nd 1498, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are".

In the case at bar, the result of the Trial Court's ruling with respect to these offers of proof, was to disallow the jury to consider anything but their own taste or moral out-

look in determining whether the materials affronted contemporary community standards. It is respectfully submitted that a conviction secured in this manner cannot be permitted to stand.

With regard to the Court's charge that children were to be considered in determining the "common conscience of the community", the Petitioner submits that this was an erroneous application of existing legal principles. This Court, in *Butler* v. *State of Michigan, (Supra)*, held a Michigan statute unconstitutional which suppressed reading material which was found to have a "potentially deleterious influence upon youth". It was there stated that:

> "The incidence of this enactment is to reduce the adult population...to reading only what is fit for children."

A similar position was taken by this Court in *Bantam Books, Inc.* v. *Sullivan, 372 U.S. 58 (1963)*. The applicability of these principles to the case at bar is clear. The Trial Court in charging that children, as a distinct class, must be considered in making a determination of contemporary community standards, gave the jury an opportunity to convict under circumstances this Court has held intolerable. The logical inference which may be drawn is that the jury could have found as a matter of fact that the material in issue does not affront contemporary community standards in view of the so-called adult material widely disseminated throughout our Nation. However, taking into account the Trial Court's instruction, the jury may reasonably have concluded that a more liberal standard is not applicable when children are to be considered. As in *Butler*, the material available to adults would necessarily be limited to only "what is fit for children". It is respectfully submitted,

therefore, that this instruction by the Trial Court is wholly inconsistent with standards created by this Court.

POINT II

The decision of the United States Court of Appeals on petitioner's claim of illegal search and seizure is inconsistant with this court's decision in Chimel v. State of California.

To properly analyze Petitioner's claim of illegal search and seizure, a more detailed recitation of the facts is necessary.

Agent Monaghan testified that as he approached the two individuals who were on the couch and insured that they presented no danger to the arresting officers, he saw on the top of what was described as end table No. 1 adjoining that couch, a copy of a magazine entitled "Color Climax No. 6". (A 150) Agent Monaghan then proceeded to search a storage area underneath the top of this table and found various items including three reels of 8mm film, allegedly obscene comic books, some magazines similar to the "Color Climax" magazine, several notebooks and Western Union Money order receipts. The introduction of one of these money order receipts, introduced at the trial as Government Exhibit 112 in evidence, is the subject of Petitioner's claim that his Constitutional rights were violated by the admission of illegally seized evidence.

After discovering these items in end table No. 1, Agent Monaghan directed Agent Conroy, who had taken custody of Carol Portela and had turned her over to the nurse, to

search the end table designated as end table No. 2. (A 153) A similar seizure was made of the contents of the second end table. Subsequent to this time, Carol Portela came out of the bathroom dressed and was seated at the dining room table with the nurse. (A 154)

The second search that was conducted that morning was elicited through the testimony of Special Agent Conroy. It was Agent Conroy's testimony that after Carol Portela was placed under arrest, she was dressed in a night gown and told that she had to change her clothing. (A 211) In reply, she indicated that she wanted to get a dress from the closet which was located in her bedroom. (A 211) The Agent's direct testimony was that she did not want the Agent to obtain the dress but that she wanted to get the dress herself. The Agent replied that it would first be necessary for him to look in the closet. It was then his testimony that she made no protest and he began a search of the closet. (A 213) At the time the search was made, the defendant, Carol Portela, was standing directly behind Agent Conroy. On the closet shelf, the Agent discovered a box of 32 calibre ammunition whose contents were marked on the box. Agent Conroy further testified that there were some other boxes on the floor. He proceeded to open one of these boxes and found a gun which he seized. (A 214)

A third search and seizure occurred when Agent Monaghan informed Carol Portela that it was raining outside and asked her where her raincoat was. Under cross-examination, Agent Monaghan testified that Carol Portela did not ask him to get her raincoat but merely pointed to the closet in which it would be found. (A 180) The Agent then proceeded to this closet, opened the door and observed a looseleaf folder on the shelf marked with the initials

"C V S". (A 155) Agent Monaghan recognized these initials as identifying matter related to one Louis Saks known to the Agent as a reputed dealer in pornography. (A 155) Upon examining this looseleaf folder the Agent discovered allegedly obscene matter. (A 155-156)

Special Agent Goas testified that upon entering the apartment from an outside terrace, he proceeded to the bar and aided his brother agent in detaining Richard J. Portela. (A 280) The agent testified that he conducted a search of the backside of the bar, next to which the Petitioner was standing. On a shelf beneath the surface of the bar, the Agent seized a double barrel tear gas gun which he testified had one cartridge in the chamber. (A 282) Agent Goas also discovered a bag containing approximately 43 color photographs of males and females in various phases of sexual activity.

Agent Roemer testified that while he was at the bar with Richard J. Portela, he noticed at his feet a brown paper bag which was opened, and he testified that he could see reels with film on it inside. It was Agent Roemer's testimony that the Petitioner, Richard J. Portela, when asked by him what was in the bag, replied: "That is hard core stuff". (A 256) This bag, too, became a subject of the seizure.

In *Chimel* v. *State of California, 395 U.S. 752 (1969)*, this Court sought to define the permissible scope of a warrantless search conducted incidental to a valid arrest. It was there held that such search may properly extend to that area in which the defendant may seize a weapon and thereby put the officer in danger or seize evidence which is destructible. In the case at bar, Petitioner submits that the warrantless

search conducted on the morning of his arrest went far beyond this well defined area.

At the time the search which was conducted by Agents Monaghan and Conroy, the Petitioner, Richard J. Portela, and the defendant, Carol Portela, were in custody and under control of the Federal Agents. Recalling the testimony of Agent Monaghan, neither of the Portelas posed any danger to the arresting officers. (A 177) In fact, the Agent agreed that the safety of the arresting agents was secured "a few moment's after entry into the apartment. (A 177)

With respect to the two individuals who had apparently been sleeping on the couch, Agent Monaghan indicated that they, too, were well within his supervised control. (A 185, 186) The Trial Court held that these two persons could possibly be considered agents or accomplices of the Petitioner and were, in effect, extensions of the Petitioner's physical presence, constructively placing Portela within reach of the two end tables. The apparent basis of this conclusion is that while both the Petitioner and his wife were approximately eighteen feet from the end tables at the time they were searched, (A 192, 193) the two unidentified individuals were two to three feet from the subject of the search. Therefore, according to the Court, the Petitioner himself was within constructive reach of the two end tables. This position was apparently adopted by the Court of Appeals. (Slip Op. 4054)

Assuming, arguendo, that the above premise is correct, the Petitioner respectfully submits that a search of these closed end tables nevertheless offends the limitations, as defined by *Chimel*, (*supra*), of a search incidental to a valid

arrest. The Trial Court noted in its decision that these two unidentified persons were neither handcuffed nor restrained in any way. The testimony elicited at the hearing reveals that neither the Petitioner nor his wife were handcuffed prior to their exiting the apartment. This situation existed even though the agents were in possession of handcuffs. In other words, where each individual in the apartment stood or remained subsequent to his arrest, and what freedom of movement each individual enjoyed, in addition to the amount of time spent in the apartment, depended solely on the Agents' discretion. It is significant to note that approximately ten minutes had passed between the time that everyone in the apartment was in the Agents' custody and the time that the end tables were searched. (A 177, 185) During this ten minute interval the Petitioner, Richard J. Portela, was dressed under the Agent's supervision and ready to leave the apartment. The narrow issue, therefore, is whether in view of the *Chimel* decision, the two persons arrested or the two unidentified individuals were in a position to seize destructible evidence or weapons which would place the officers in danger. It is now submitted that such seizure was impossible, and that the search of these tables went well beyond the scope of the Petitioner's "immediate control". The ten minute delay and the fact that not even the Petitioner was handcuffed when this could easily have been effected, clearly indicates that these trained Federal agents subjectively felt that they were in no danger. The remaining question pertains to the potential destructibility of possible evidence concealed in the closed end table.

The *Chimel* decision, (*supra*), it is respectfully submitted, in seeking to define "immediate control", set forth a

definition not only in terms of time and distance but more significantly, created a rule whereby the purpose of the search becomes the overriding factor. The facts in the instance case, Petitioner contends, do not allow a closed end table unrelated to the safety factor of the arrest, to fall within the carefully prescribed area.

POINT III

The petitioner, Richard J. Portela, adopts and urges each of the points which may be asserted by his co-appellants in the United States Court of Appeals in their petition to this court for a writ of certiorari.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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August 6, 1971

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 810-814—September Term, 1970.

(Argued May 6, 1971 Decided July 7, 1971.)

Docket Nos. 35606, 71-1014, 71-1045, 71-1046, 71-1047

UNITED STATES OF AMERICA,

—v.—

Appellee,

SAMUEL F. MANARITE, RICHARD PORTELA, LUIS MARTI, FERRIS JACOB ALEXANDER and DOMINICK CONSTANTINO,

Defendants-Appellants.

Before:

LUMBARD, SMITH and KAUFMAN,
Circuit Judges.

Defendants appeal from judgments of conviction in the Southern District for violation of 18 U.S.C. § 1465 and 18 U.S.C. § 371, transportation and conspiracy to transport obscene material in interstate commerce, Lloyd F. MacMahon, *J.*, and a jury.

Affirmed.

RICHARD E. LINDSAY, United States Department of Justice, Washington, D. C. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, New York, of counsel), *for the appellee United States of America.*

WILLIAM S. ELLIS, New York, New York, *for defendant-appellant Samuel Manarite.*

JAMES M. LA ROSA, New York, New York (Gerald L. Shargel, New York, New York, of counsel), *for defendant-appellant Richard Portela.*

PATRICK M. WALL, New York, New York, *for defendant-appellant Luis Marti.*

HERALD PRICE FAHRINGER, Buffalo, New York (Lipsitz, Green, Fahringer, Roll, Schuller and James, Buffalo, New York and Robert Millavetz, Minneapolis, Minnesota, of counsel), *for defendant-appellant Ferris Jacob Alexander.*

MICHAEL P. DIRENZO, New York, New York, *on behalf of defendant-appellant Dominick Constantino.*

LUMBARD, *Circuit Judge:*

Samuel F. Manarite, Richard Portela, Luis Marti, Ferris Alexander and Dominick Constantino appeal from judgments of conviction following a 15-day trial in the Southern District of New York before Hon. Lloyd F. MacMahon, which resulted in jury verdicts against them on October 28, 1970. The appellants were all convicted of conspiracy under 18 U.S.C. § 371 to violate 18 U.S.C. § 1465 (transportation in interstate commerce of obscene material for purpose of sale or distribution) and on other counts of the 13 count indictment which charged substantive violations of § 1465.[1]

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[1] 18 U.S.C. §1465 provides in part:

"Whoever knowingly transports in interstate . . . commerce for the purpose of sale or distribution any obscene . . . book . . . or any other matter of indecent or immoral character, shall be fined not more than $5000 or imprisoned not more than five years, or both.

"The transportation as aforesaid of two or more copies of any publication [or article] . . . of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable. . . ."

Manarite was sentenced to eighteen months in prison, and fined $5,000; Portela was sentenced to three years in prison and fined $30,000; Marti to two years in prison and fined $15,000; Portela to three years in prison and fined $30,000; Constantino received a year and a day and a $5,000 fine, while Alexander was sent to prison for eighteen months and fined $20,000; and Constantino received a year and a day and was fined $5,000.[2]

The appellants assert numerous claims of error which we treat as follows:

I. The Sufficiency of the Evidence

II. Alleged Errors Involving Admission of Evidence Relating to Extrajudicial Statements of Co-Conspirators

III. Alleged Errors Relating to the Determination as to the Pornographic Nature of the Material

IV. Evidence Seized Incident to Portella's Arrest

V. Use of Hearsay Evidence Before the Grand Jury

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[2] Alexander and Portela were convicted on Counts Seven and Ten (relating to transportation between New York and Minneapolis of 10,000 copies of "Adam and Eve" and "Kiss it Hard" magazines, respectively). Portela was also convicted on Count Twelve (relating to transportation of 1,000 copies of "Color Climax" magazine from New York to Baltimore) and, along with Marti, on Count Thirteen (transportation of certain films from New York to Baltimore). Three defendants were acquitted in all respects: Salvatore Puntasecca, Max Bornstein and Carol Portela, wife of appellant Richard Portela. References to "Portela" unless otherwise indicated are to Richard Portela.

VI. Constitutionality of § 1465

As we find that there was more than ample evidence to support the convictions, and no reversible error in the conduct of the trial, we affirm the convictions.

I.

The Sufficiency of the Evidence

During the three week trial, the government advanced abundant evidence from which the jury could find that the appellants were guilty of the conspiracy, as charged, to produce hard core pornography in New York and distribute it to various cities, including Richmond, Philadelphia, Minneapolis, Cleveland, Washington, D. C., Chicago and Baltimore. and of the substantive offenses of which they were convicted. The evidence, which included testimony by four witnesses who were active participants, may be summarized as follows: Films were produced in Manhattan by Marti, who owned a shop known as the "Camera Eye" located at 12 West 21st Street, and the magazines and other printed matter were produced by Phil Frimet, the owner of "Anchor Litho" printing shop on 12th Street, in Manhattan, with the exception of one magazine which Frimet arranged for a sub-contractor to print. Frimet testified fully as to the nature of his activities. Portela distributed the material thus produced and employed various persons to assist him in this operation. Bruce Valentine and Frank Del Rosso testified at length as to trips which they made alone or

with other co-conspirators for the purpose of selling and delivering the material in question for Portela and Marti. Manarite was the financier of the group. Alexander was a Minneapolis dealer who purchased material from Portela and Marti, and caused it to be transported in interstate commerce for commercial distribution.

The events recounted at the trial began in September or October, 1968, with the purchase by Frimet of "Anchor Litho." Initially, Frimet produced obscene playing cards which were purchased by Portela and defendant Paul Wolf.[3] Constantino picked up these cards from Frimet on behalf of Portela and Wolf. In December, 1968, Portela engaged Bruce Valentine to assist him in distributing the material which he was ordering from Frimet and Marti. Portela and Valentine went to Philadelphia and Baltimore for the purpose of selling "Action," an obscene magazine printed by Frimet. Soon thereafter, Portela and Valentine went to Cleveland to sell certain hard core films which Constantino had transported to that city. During this trip, Portela told Valentine that Marti was the only producer of hard core films in Manhattan. Then, in February, Valentine and Constantino only, made a third trip to Baltimore and Philadelphia, for the purpose of selling films, playing cards and books. Valentine described the material as consisting of depictions of men and women engaged in sexual activities, apparently similar to the mass of materials admitted into evidence.

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[3] Prior to trial upon the government's motion, the case was severed as to six defendants, and of these Phil Frimet and Frank Del Rosso pleaded guilty to the conspiracy count and testified as government witnesses.

In January, 1969, Ferris Alexander,[4] came to New York from Mineapolis and ordered some had core materials from Portela, and Portela told Alexander that he would send him these materials. In February, Valentine and Carol Portela drove to Minneapolis with a U-Haul trailer and delivered 10,000 copies of "Adam and Eve" magazine, another Frimet production. Valentine picked up the material in Manhattan at the Casco Bindery, an establishment owned by one Herb Goldwasser, assisted by Constantino, Frimet, Bornstein, Portela and Wolf. Subsequently, in March, 1969, Valentine delivered an additional 10,000 copies of "Adam and Eve" to Alexander and in April 10,000 copies of "Kiss it Hard," still another product of the Frimet establishment, were delivered, part of a run of 30,000 copies of that title printed in April.[5] On the last occasion Alexander gave Valentine about one thousand films with which he was dissatisfied and asked that they be returned to Portela for credit. When Valentine gave these films to Portela, Portela said that the films came from Marti and not from him. The next day, Portela told Valen-

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[4] Unless otherwise indicated "Alexander" refers to the appellant Ferris Alexander. His brother, Edward Alexander, was named as a co-defendant but his trial was severed from that of the appellants.

[5] On the basis of this evidence, the jury could have concluded that Alexander ordered the material (or at least encouraged Portela to bring it to him on approval) before the material was in fact brought into the state and thus the evidence was clearly sufficient as to the convictions of Alexander (as well as Portela) on Counts Seven and Ten relating to the March and April trips to Minneapolis respectively. We have no occasion to consider the application of § 1465 to cases where a person has no connection with those transporting material in interstate commerce until after the material was brought into the state. Cf. *Rewis* v. *United States*, 401 U.S. —— (April 5, 1971).

time that he was flying to Minneapolis with Bob Shuttlesworth, Marti's bookkeeper, to settle the matter.

Additional copies of various issues of "Kiss it Hard" were sold by Frimet and Constantino during a sales trip to Baltimore. "Kiss it Hard" unlike other magazines printed by Frimet, was produced on a partnership basis with Portela. In other cases, Portela and Wolf paid Frimet in cash.

In April, 1969, Del Rosso was engaged by Portela to assist in delivering pornographic materials. Del Rosso testified that, in persuading him to do this work, Portela told Del Rosso that Lou Marti was Portela's supplier of films. That same month, Del Rosso and one Owen Osterman rented a U-Haul and a truck for a sales trip to Baltimore, Washington, D. C., Philadelphia and Virginia. Among the items sold on this trip was "Adam and Eve." Del Rosso went to "Camera Eye" where Marti gave him additional books and magazines for the trip which he was about to undertake. In any event, Portela told Del Rosso that all sales made on his trip should be made on a cash basis if possible, and otherwise checks were to be made out to Lou Marti's "Camera Eye." Subsequently, Del Rosso made a sales trip to Minneapolis.

At about this time, Valentine spoke to Marti about purchasing films from him which he said he would try to sell in Baltimore. Marti refused to sell films to Valentine for this purpose on the ground that he sold his films in Baltimore through Portela. However, Marti agreed to let Valentine purchase films for resale in Chicago, and supplied Valentine with a list of possible sales prospects in that city.

In late May, James Kelly,[6] who had just opened a book store in Baltimore, came to New York and purchased from Portela obscene playing cards, "Kiss it Hard" and "Tiny Tim," another magazine produced for Portela and Wolf by Frimet. A few days later Portela delivered some color film to Kelly in Baltimore. Shortly thereafter about 1,000 copies of "Color Climax" were sold to Kelly by Portela and they were delivered to Kelly by Manarite who fixed the price to be paid.

On June 25, the Baltimore police raided Kelly's shop and seized various obscene articles pursuant to a warrant. Copies of "Color Climax," "Kiss it Hard" and "Tiny Tim" were among the publications seized in this June 25 raid. Thereafter, Portela contacted Kelly by telephone and asked him if he wanted any new films. Kelly replied in the affirmative and then contacted the F.B.I. Portela registered in the Baltimore Holiday Inn under the alias "Nick Devito" where Kelly came to meet him on July 12. After two boxes of obscene films were transferred to Kelly's car, the Baltimore police arrested both Portela and Kelly, along with several others, and seized the films. Portela told Kelly over coffee after they had been released on bail, that Lou Marti supplied most of the films which had been the cause of their arrest, while a few films had come from one Lou Saks.

On July 23, Carol and Richard Portela were arrested in their apartment in Rego Park, New York, pursuant to a warrant issued by a United States Commissioner, on complaint of an F.B.I. agent. Hard core pornographic materials

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[6] Klly was indicted as a co-conspirator. His trial was severed and he testified for the government.

were seized, along with a tear gas gun, a .32 caliber gun and various other items. Thereafter the appellants were indicted on October 27, 1969.

The magazines, playing cards, and films distributed by the conspirators were introduced in evidence. These materials graphically depict nude (or virtually nude) men and women, men and men and women and women engaged in various sexual acts, including sexual intercourse, fellatio, cunnilingus, sodomy and the like in numerous permutations and combinations. No attempt was made, or could be made, to suggest that any of this material constitutes instructional material on sexual technique, that it documents sex habits or that it has any social value. The evidence shows that the appellants themselves referred to this material as "hard core pornography," which is all that it is.[7]

Sufficiency of the Evidence

There was ample evidence to support the conviction of each of the appellants of each of the counts of which they were convicted.

Alexander argues that even if on two isolated occasions he may have committed substantive violations of § 1465, there is no proof that he was involved in a conspiracy to violate that section, or at least he was not proved to be part of the conspiracy charged. We do not agree. The conspiracy here shown was of the type sometimes referred to as a "wheel conspiracy" in that members of

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[7] See Mr. Justice Stewart's definition of the term "hard core pornography" in his opinion in *Ginzberg* v. *United States*, 383 U.S. 463, 499 n. 3 (1966).

a "core" group deal with a number of contacts who are analogized to the spokes of a wheel and are connected with each other only through the core conspirators. In such conspiracies, whether the spoke participants may be found to be members along with the core conspirators depends on whether or not the "spokes" knew or had reason to know of the existence, but not necessarily the identity, of one or more of the other spoke participants in the wheel conspiracy. Compare *United States* v. *Kotteakos*, 328 U.S. 750 (1946) with *United States* v. *Blumenthal*, 332 U.S. 539, 559 (1947).[8] See also *United States* v. *Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944).

On this record it is obvious that Alexander must have known that this material which was delivered to him in quantities of 10,000 copies at a time was also being distributed to other dealers. He visited Portela in New York and must have been aware of the nature and extent of the conspiracy and its operation. See *United States* v. *Aiken*, 373 F.2d 294 (2d Cir. 1967), cert. denied, 389 U.S. 833 (1967).

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[8] In *Kotteakos*, the convictions of persons accused of conspiracy to violate the National Housing Act were reversed because the only connection between the various persons involved was that each had made fraudulent applications to the same broker. However, in *Blumenthal*, the Supreme Court affirmed the convictions of salesmen involved in the illegal sale of liquor on the theory that each was "aiding in a larger plan."

II.

Alledged Errors Involving Admission of Evidence Relating to Extrajudicial Statements of Co-Conspirators

Lou Marti argues that many of the statements admitted under the co-conspirator exception to the hearsay rule were improperly admitted. The testimony challenged includes the following:

(1) Valentine's testimony that Portela told Valentine that Marti had been the seller of certain films which were returned by Alexander to Portela via Valentine.

(2) Valentine's testimony that Portela told Valentine when they drove to "Camera Eye" that Portela was going to go into the shop to order films from Lou Marti.

(3) Agent McShane's testimony that Portela had an argument with Wolf during which Portela said that they should "let Lou Marti settle this."

(4) Del Rosso's testimony that Portela told Del Rosso that Portela obtained films from Marti.

(5) Valentine's testimony relating to his conversation with Marti wherein Valentine sought to purchase films for sale in Baltimore was rebuffed on the grounds that Portela sold Marti's films in Baltimore, but then was sold films for resale in Chicago and given a list of possible customers.

(6) Kelly's testimony that after he and Portela were arrested, Portela told Kelly that Portela obtained films from "Poncho" [Marti].

(7) Valentine's testimony that Portela told Valentine that Marti was the only producer of hard core films in Manhattan.

Also challenged as not within the scope of the conspiracy is Valentine's testimony that Portela told him that Manarite was financing the operation. Appellant contends that the above statements should have been excluded as either not in furtherance or not in the course of the conspiracy charged. We do not agree.

Statements of co-conspirators made in furtherance and in the course of a conspiracy are admissible as each of the conspirators is an agent of the other conspirators, and, therefore, such statements are evidence against all those involved in the conspiracy. See *Lutwak* v. *United States,* 344 U.S. 604, 617-18 (1953); *Logan* v. *United States,* 144 U.S. 263 (1892); *United States* v. *Birnbaum,* 337 F.2d 490, 495 (2d Cir. 1964).[9]

The first challenged statement seems clearly to have been within the scope of the conspiracy. Alexander was seeking refunds from Portela on certain films for which Portela felt he was not responsible. It was necessary to clarify responsibility for these films in order to maintain Alexander's continued cooperation, and to do this Portela

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[9] This rule is codified in the proposed Federal Rules of Evidence, Rule 801(d)(2)(v). Proposed Rule 801(d) provides in part:

"(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

. . .

(2) *Admission by Party-Opponent.* The statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

and Marti's bookkeeper promptly flew to Minneapolis. In order to avoid recurrence, Portela wanted Valentine to understand that he should not accept such returns. See *United States* v. *Annunziato,* 293 F.2d 373, 380 (2d Cir. 1961), cert. denied, 368 U.S. 919 (1961).

Similarly, the second challenged statement, relating to Portela's intent to buy films from Marti, made as Portela was about to go to the "Camera Eye," could be interpreted to be an attempt by Portela to acquaint Valentine with the practice of the conspirators so that Valentine would conform thereto.

The third statement, Portela's suggestion to Wolf that they let Lou Marti settle their dispute, is clearly in furtherance of the conspiracy because it was an attempt to find a means to insure its continuance, in the face of a serious disagreement between two of the key figures.

Number four, Portela's statement to Del Rosso that Lou Marti supplied the films could be considered as an inducement for Del Rosso to enter the conspiracy.

As to number five, Marti's statement that Valentine couldn't sell in Baltimore because that was Portela's territory obviously was in furtherance of the main conspiracy and was admissible on that basis regardless of whether Marti and Valentine had entered into any separate conspiracy. The fact that Marti agreed to allow Valentine to sell his films in Chicago and to furnish a list of possible customers in that city (in addition to suggesting that Marti had a stake in Valentine's venture), is not itself hearsay, since offered to prove the fact of agreement rather than the truth of any assertion relating to past or future agreement. Similarly, the testimony regarding possible

purchasers in Chicago was clearly in furtherance of the conspiracy.

The sixth item, relating to Portela's statement that Marti was the only producer of hard core films in Manhattan, may well have been made in order to emphasize to Valentine the importance of Marti to the operation. Valentine, who previously had held Marti up at gun point, had not in the past shown proper deference to someone so important to the functioning of the conspiracy, and the jury might infer that Portela wished to avoid any repetition of this sort of conduct insofar as Marti was concerned.

Portela's identification of Marti as the supplier of the films seized in the July 12 shipment to Baltimore was made to Kelly after they both had been arrested and then released from custody. However, their arrest did not necessarily terminate the conspiracy. *United States* v. *Agueci,* 310 F.2d 817, 838-39 (2 Cir. 1962), cert. denied, 372 U.S. 959 (1963). Portela told Kelly in that same conversation that he intended to continue in the pornography business. In this context, his mention of Marti may well have been to persuade Kelly to continue to deal with the conspirators, despite their arrests.

As to Portela's remark to Valentine that Manarite was financing the operation, this could have been for the purpose of suggesting to Valentine the need to show deference to certain figures in the conspiracy, in this case to Manarite, whom he was about to meet.

We find no error in the admission of this evidence.

III.

Alleged Errors Relating to the Determination of the Court and Jury as to the Ponographic Nature of the Material

The claims of the appellants relating to alleged errors in the Court's charge on obscenity, and the admissibility of certain evidence sought to be introduced on the issue of contemporary community standards, have an unreal quality in the light of the nature of the material described, and in the light of the use of the term "hard core" by the conspirators themselves in describing the material. In any event, the contentions of the appellants in this respect are entirely without merit.

Charge on the Elements of Obscenity

The Court, in charging the jury on the elements of obscenity, properly stated the applicable law. See *United States* v. *Roth,* 354 U.S. 476 (1957); *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966); *Redrup* v. *United States,* 386 U.S. 767 (1967); *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964); *Mishkin* v. *New York,* 383 U.S. 502 (1966). The appellants, however, challenge two portions of the charge. The first portion challenged dealt with the determination of community standards:

> "In determining the common conscience of the community, you are to consider the community as a whole, young and old, educated and uneducated, the religious and irreligious, men, women, and children, from all walks of life, in all sections of the country."

We find no error in this charge. It makes it clear that the community as a whole is to be considered in deter-

mining what its standards are. It does not put any undue emphasis on the fact that children are part of this community. See *Butler* v. *Michigan*, 352 U.S. 380 (1957).[10]

A second portion of the charge complained of related to the small percentage of the material which might be deemed as appealing to persons with deviant sexual interests. The Court, after dealing with the general requirement that in order to be obscene, material must have prurient appeal, stated:

> "Some of the material charged as obscene deals with sexual conduct that deviates from normal heterosexual conduct, such as lesbianism and homosexuality. Where the material is designed for a clearly defined deviate sexual group rather than to the public at large, the prurient appeal requirement is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group" (R. 1927).

It is claimed that this charge is deficient in that it fails to state that the special rule charged is applicable only if there is independent proof that the material was designed for and primarily disseminated to a clearly defined sexual group. This claim is without merit. Under *United States* v. *Mishkin*, *supra*, this variation of the prurient interest requirement applies where the "probable recipient group"

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[10] This charge puts slightly less emphasis on children in defining the nature of the community than did the charge in *Roth* v. *United States*, *supra*, which stated that:

> "[t]he community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community."

See *Ginzberg* v. *United States*, 383 U.S. 463, 465, n. 3 (1966).

consists of deviates. This would surely be true whenever, in the words of the charge "the material is designed for a clearly defined deviate sexual group."

Exclusion From Evidence of Comparable Material Offered on the Issue of Community Standards

The appellants sought to introduce evidence supposedly relevant on the issue of community standards. This evidence included materials purchased in Los Angeles which the defendants offered to prove were also available in other major metropolitan areas, material purchased in New York City, films showing in New York City and the Report of the Commission on Obscenity and Pornography.

The appellants do not contest that under *United States* v. *Wild,* 422 F.2d 34 (2d Cir. 1969), cert. denied, —— U.S. —— (May 17, 1971), it was not necessary for the government to introduce evidence on the issue of community standards in view of the "hard core" nature of the materials.

Of course, the appellants had the right to introduce evidence on community standards. The question is whether the evidence offered by the appellants was proper evidence on this issue. We conclude, as did the trial Court, that it was not.

Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance. *Womack* v. *United States,* 294 F.2d 204, 206 (D.C. Cir. 1961), cert. denied, 365 U.S. 859 (1961). Such proof would normally be supplied by expert witnesses. No such proof

was offered. In the absence of this foundation, the allegedly similar pornographic material was properly excluded. Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.

As to the Report of the Commission on Obscenity and Pornography, it was properly excluded as in large part irrelevant and as usurping the function of the jury. Introduction of such material is not a proper substitute for the testimony of expert witnesses whose opinions can be tested by appropriate cross examination.

IV.

Evidence Seized Incident to Portela's Arrest

Portela challenges the admission into evidence of certain items seized in his apartment on July 23, 1969, when he was arrested there pursuant to a warrant. His sole challenge to this search is that it was not conducted in accordance with the restrictive standards of *Chimel* v. *California,* 395 U.S. 752 (1969), decided one month earlier. We are in full agreement with Judge MacMahon's opinion denying Portela's motion to suppress this evidence. See *United States* v. *Manarite,* 314 F. Supp. 607, 613-16 (S.D.N.Y. 1970). A tear gas gun, a bag containing photographs and a bag containing ammunition was found in a bar within six inches of where Portela was standing at the time they were seized. Two address books and a bag containing what Portela described as "hard core" film was found on the

bar. Additional matter including a gun and .32 caliber ammunition was found in closets to which the agents went at the request of Mrs. Portela to get for a dress and a raincoat. Other material, including Western Union money order receipts and copies of "Color Climax" were found near an end table near which several unidentified persons were standing. The F.B.I. agents were justified in assuming that these persons might be accomplices of those arrested and hence might attempt to destroy evidence or procure a weapon on behalf of appellants. This was an obvious possibility in view of the fact that a gun had already been found on the premises. Thus, as Judge MacMahon found, the search and seizure incident to the July 23 arrest were entirely within the scope of *Chimel.*

V.

Use of Hearsay Evidence by the Grand Jury

The indictment herein is challenged on the ground that it was based in part on hearsay testimony. The grand jury was shown the magazines and other printed material involved in this case, but was not shown the movies. Appellants' contention that the jury should have viewed some or all of the hundreds of films involved in this case is entirely unwarranted especially in view of the fact that the content of the films was described to them in competent testimony. See *Costello* v. *United States,* 350 U.S. 359, 363 (1956). There was no reason for the grand jury to view the films. They had a sufficient description of them and could call for their display if they felt it necessary to do so.

VI.

Constitutionality of §1465

The appellants claim that, on its face, or as applied, §1465 is unconstitutional, citing *Stanley* v. *Georgia*, 394 U.S. 557 (1969). However, the Supreme Court in *United States* v. *Reidel*, U.S. (May 3, 1971), upheld the constitutionality of §1461 which forbids the mailing of pornographic material. The Supreme Court held that under *Roth* v. *United States, supra,* obscene materials are not protected by the first amendment, and that the limited right to receive pornography established by *Stanley* did not establish a corresponding right to sell such materials. *A fortiori,* it follows that §1465, which specifically requires that the transportation in interstate commerce be "for the purpose of sale or distribution," is also constitutional.

Alexander also claims that §1465 is unconstitutional because of the provision contained therein that the transportation of two or more copies of any publication or article or a combined total of five such publications or articles creates a presumption that such articles are intended for sale or distribution. Such a presumption is clearly valid as applied to this case where each delivery involved large numbers of magazines and/or films, usually in the thousands.

We have considered the other arguments raised by appellants and find them to be without merit.

The judgments appealed from are affirmed.